Filed 2/9/10 In re P.M. CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re P.M., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B214507, B215253 (Super. Ct. No. J-1252094) (Santa Barbara County)
SANTA BARBARA COUNTY CHILD WELFARE SERVICES, Plaintiff and Respondent, v. G.S. et al., Defendants and Appellants.	

P.M., Sr. ("Father") and V.E. ("Mother") appeal an order of the juvenile court declaring that their son is adoptable and terminating their parental rights. (Welf. & Inst. Code, § 366.26, subd. (c)(1).) We affirm.

G.S. and M.S., the paternal great-grandparents ("Great-grandparents"), appeal an order of the juvenile court denying their modification petition requesting placement of the child with them. (Welf. & Inst. Code, § 388.) We affirm.

FACTS AND PROCEDURAL HISTORY

On July 27, 2007, Santa Barbara County Child Welfare Services ("CWS") filed a dependency petition on behalf of 19-month-old P. CWS alleged that P. suffered facial bruises and a possible subarachnoid hemorrhage while in the care of his great-

grandparents. Upon prompting by a Sojourn in-home aide, Mother sought medical care for P. The physician who examined P. noted that he was lethargic and difficult to arouse, and concluded that he suffered from non-accidental trauma. Mother informed the physician that Father had assaulted her that day. Great-grandparents informed a police officer that P. hit his head on a church pew and also fell at home. CWS also alleged that Father had a criminal record including convictions for domestic violence and substance abuse. CWS alleged that P. had suffered serious physical harm and that his parents had failed to protect him. (Welf. & Inst. Code, § 300, subds. (a), (b).)

On July 30, 2007, the juvenile court held a detention hearing. Mother, then 17 years old, and Father, then 19 years old, attended the hearing and received appointed counsel. Mother personally informed the court that she had not yet read the dependency petition, confirmed that her stated address was correct, stated that P. was in foster care, and advised the court that Father had Yaqui Indian heritage. The parties then stipulated to P.'s detention.

On September 13, 2007, Mother and Father waived their rights to trial and submitted to the court's jurisdiction. The juvenile court then sustained the allegations of an amended dependency petition. On October 18, 2007, the court held a contested disposition hearing. Following admission of CWS reports and argument by the parties, the court continued P. as a dependent child in foster care and ordered CWS to provide family reunification services to Mother and Father.

The family reunification services plan required Mother to participate in a psychological evaluation, comply with mental health recommendations and treatment, participate in and complete a parent education program, and maintain a suitable residence for P., among other things. The plan required Father to participate in a psychological evaluation, comply with mental health recommendations and treatment, participate in and complete a substance abuse program and a parent education program, maintain a source of income to support P., and maintain a suitable residence for P., among other things. Mother then lived with her mother who suffers from developmental disabilities and Father lived with Great-grandparents.

Neither Father nor Mother substantially complied with their reunification plans. In 2008, Father was convicted of auto theft, exhibiting a deadly weapon, evading a police officer, and receiving stolen property. He received a 44-month prison term. Mother lost her financial assistance, rented her garage to a fugitive, did not complete psychological counseling, and struck P. on the back during a supervised visit. On November 17, 2009, the juvenile court terminated family reunification services and set the matter for a permanent plan hearing. (Welf. & Inst. Code, § 366.26.)

On March 19, 2009, the juvenile court held a contested permanent plan hearing and received evidence of CWS reports and testimony from Mother, Father, and Great-grandfather. The court then concluded by clear and convincing evidence that P. is adoptable and terminated parental rights. (Welf. & Inst. Code, § 366.26, subd. (c)(1).)

Indian Child Welfare Act (25 U.S.C. 1901 et seq.) ("ICWA")

On August 21, 2007, CWS sent notices on Judicial Council Form JV-135 ("Notice of Involuntary Child Custody Proceedings for an Indian Child") to the Bureau of Indian Affairs and the Pascua Yaqui Tribal Council concerning the dependency proceedings. The notices stated the name and address of the paternal great-grandmother, but not her date and place of birth or information regarding her ancestry. Subsequently, the Indian tribe responded that neither Mother nor Father are members of the Yaqui tribe nor do they have membership applications pending; P. is not eligible for membership; and Great-grandmother is not a member. CWS filed the postal return receipts for Form JV-135 and the Yaqui responses with the juvenile court. On March 19, 2009, the court found that ICWA did not apply.

Great-grandparents Modification Petition

On February 7, 2008, the juvenile court granted Great-grandparents' application for de facto parent status based upon the parties' stipulation. Great-grandparents later filed a modification petition requesting placement of P. In part, they supported the petition with a declaration from a school psychologist commending their parent skills as applied to their two adopted children with hyperactivity disorders. At the hearing, Great-grandmother testified that P. had been in her care for a significant portion

of his life and that she had visited him consistently during the dependency. She stated that she would not permit Mother and Father to have unauthorized contact with him. Great-grandmother also testified regarding her experience in caring for children with hyperactive behavior. Great-grandfather stated that they were completely committed to providing a loving and stable home for P.

On February 20, 2009, following a contested hearing, the court decided that Great-grandparents did not establish changed circumstances warranting a different placement and that the best interests of P. were served by his current placement. It then denied the petition.

Post-order ICWA Notices and Proceedings

Following termination of parental rights, CWS filed a status review report describing additional information provided to the Yaqui Indian tribe, the Bureau of Indian Affairs, and the United States Department of the Interior regarding Great-grandmother, the great-great-grandmother, and Father's mother (P.'s grandmother). On September 24, 2009, CWS filed return receipts for the additional notices, copies of the notices (ICWA-030), and the response of the Indian tribe with the juvenile court.[1] The tribe's responsive letter states that neither P. nor his parents are members of the tribe nor do they have membership applications pending. At a noticed hearing on October 15, 2009, the court found that ICWA does not apply to P. The court's minute order for the hearing states that "appellate counsel and trial counsel agree there is no ICWA interest."

Mother and Father appeal and contend that 1) the juvenile court erred by not appointing Mother a guardian ad litem ("GAL"); 2) the juvenile court erred by finding that ICWA did not apply; 3) the juvenile court abused its discretion by denying Great-grandparents' modification petition. Great-grandparents also appeal and challenge the denial of their modification petition. By our order of June 5, 2009, we consolidated the appeals.

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[1] By prior order, we granted CWS's motion to augment the record to include these documents.

DISCUSSION

I.

Mother and Father argue that the juvenile court prejudicially erred by not appointing sua sponte a GAL for Mother. (Code Civ. Proc., §§ 372, 373; *In re D.D.* (2006) 144 Cal.App.4th 646, 654 [dependency proceedings vacated where father, himself a dependent child, had neither GAL nor an attorney to represent him].) They contend that the proceedings were fundamentally unfair because Mother's attorney waived Mother's substantive rights. (*In re M.F.* (2008) 161 Cal.App.4th 673, 681 [failure to appoint GAL prejudicial where minor-parent's rights compromised at key hearings].) In addition, they assert that she suffered prejudice because she did not challenge the medical evidence supporting the jurisdiction allegations nor did she challenge the reasonableness of the reunification services plan. They point out that the court accepted Mother's waiver of trial rights without inquiry regarding her understanding of the rights, an explanation of the consequences of the waiver, or a finding that the waiver was voluntary and intelligent. (Cal. Rules of Court, rule 5.682(b), (f).)

For several reasons, there is no error.

During the time of the detention, jurisdiction, disposition, and initial review hearing, Mother was 17 years old. At the time the juvenile court terminated family reunification services (12-month review hearing) and parental rights, Mother was 18 years old. At all times Mother was represented by court-appointed counsel who did not object to the court's failure to appoint a GAL. Mother attended all critical hearings and provided the court with information concerning Father's pending criminal prosecution, the inadequacies of his criminal attorney, and his Indian ancestry, among other things. She also testified at the permanent plan hearing. Although evidence exists that Mother's mother is developmentally disabled, the record does not contain evidence that Mother is disabled, mentally ill, or incompetent.

Code of Civil Procedure section 372, subdivision (a) provides that in any proceeding in which a minor is a party, "that person shall appear . . . by a guardian ad litem appointed by the court in which the action or proceeding is pending . . . ." Code of

Civil Procedure section 373 provides for the appointment of a GAL for a minor by the court on its own motion. A court's failure to appoint a GAL is not a jurisdictional defect, but is subject to review for prejudice. (*In re M.F.*, *supra*, 161 Cal.App.4th 673, 680.)

Mother did not object to the court's failure to appoint a GAL. During the final eight months of the dependency proceedings, Mother was 18 years old and an adult. Thus she has waived the issue on appeal. (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558 [party in dependency proceeding must object timely to nonjurisdictional issue to preserve issue on appeal].)

Waiver aside, Mother attended the dependency hearings, understood their nature, and participated therein. *In re D.D.*, *supra*, 144 Cal.App.4th 646, is not persuasive. There a presumed and disabled father, himself a dependent child, appealed an order terminating his parental rights. He asserted that the court failed to appoint either counsel or a GAL to represent him until the six-month review hearing. (*Id.* at p. 648.) The reviewing court vacated all findings and orders subsequent to the detention hearing, deciding that "[b]ecause [the presumed father] was a minor and had neither a guardian ad litem nor an attorney to represent him, we conclude the proceedings were fundamentally unfair." (*Id.* at p. 654.) Here Mother appeared and was represented by counsel at every hearing.

Moreover, effective January 1, 2009, the Legislature amended Code of Civil Procedure section 372 to allow a minor-parent to appear in a dependency proceeding without a GAL. (*Id.*, subd. (c)(1).) Subdivision (c)(2) requires the court to appoint a GAL if the minor is unable to understand the nature of the proceedings or to assist counsel in preparing the case. In addition, the Legislature enacted Welfare and Institutions Code section 326.7 stating: "Appointment of a guardian ad litem shall not be required for a minor who is a parent of the child who is the subject of the dependency petition, unless the minor parent is unable to understand the nature of the proceedings or to assist counsel in preparing the case." Although these sections were not in place at the time of Mother's minority, they reflect the legislative intent that appointment of a GAL is not required in every dependency proceeding.

II.

Mother and Father argue that the juvenile court erred by finding that ICWA did not apply because CWS did not provide timely and proper notice to the Yaqui Indian tribe. They point out that the notices did not state their places of birth and provided little information about Great-grandmother.

The juvenile court properly determined that CWS satisfied the notice requirements of ICWA and that P. is not an Indian child pursuant to the law. In post-judgment proceedings, CWS provided proper notice to the Yaqui Indian tribe and the Bureau of Indian Affairs regarding P.'s ancestry. (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 865-867 [appellate record augmented showing compliance with ICWA]; *In re Francisco W.* (2006) 139 Cal.App.4th 695, 703 [required content of notice]. CWS then filed copies of the notices, the return receipts, and the tribe's response with the court. The court read and considered the information at a noticed hearing attended by Father's counsel. The court properly found that ICWA does not apply to P.

III.

Mother, Father, and Great-grandparents argue that the juvenile court abused its discretion by denying the modification petition regarding P.'s placement with Great-grandparents because it did not consider "the essential circumstances," e.g., the changed circumstances that Great-grandparents were now accorded de facto parent status. (*Marriage of Lopez* (1974) 38 Cal.App.3d 93, 117, disapproved on another ground by *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 453.) They point out that great-grandparents are a statutory class of relatives given "preferential consideration" of a dependent child. (Welf. & Inst. Code, § 361.3, subds. (a), (c)(1), (2); *In re Sarah S.* (1996) 43 Cal.App.4th 274, 285 [section 361.3 requires court to consider relative's request for placement prior to considering non-relative's request].) They add that they timely completed an application requesting P.'s placement, with CWS's encouragement, prior to his removal to a second foster-adoptive home in December 2008. They also point out that Great-grandparents are experienced caregivers who have taken parent education classes, have two adopted children with special needs and hyperactivity

disorders, have attended every court hearing regarding P., and are in good health in their fifth decade of life. (*In re T.S.* (2003) 113 Cal.App.4th 1323, 1326 [a grandparent's age not a legal impediment to adoption].) They add that Great-grandparents have been exonerated as a cause of P.'s bruises and that P. did not suffer any head injury. Great-grandparents assert that "the Court did not understand the nature of the action presented, and neither heard nor understood the evidence presented at trial." They contend the court did not apply the law correctly and, therefore, our review is de novo.

At a hearing regarding a change of placement, the burden of proof rests upon the moving party to establish by a preponderance of the evidence that there exists new evidence or that there are changed circumstances that make a change of placement in the best interest of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) This determination is committed to the juvenile court's discretion. (*Id.* at p. 318.) A reviewing court will not disturb the trial court's ruling unless it is arbitrary, capricious, or unreasonable. (*Ibid.*)

Following the termination of family reunification services, the court's focus shifts from the parents' interests in the custody of their child to the child's need for permanency and stability. (*In re Stephanie M.*, *supra*, 7 Cal.4th 295, 317.) Indeed, there exists a rebuttable presumption that continued foster care is in the child's best interests. (*Ibid.*) "A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*Ibid.*)

The juvenile court did not abuse its discretion by denying the modification petition because insufficient evidence exists that a change of placement was in P.'s best interests. Although Great-grandparents did not cause P.'s injuries, they failed to obtain prompt medical attention for him. Moreover, the court could disbelieve Great-grandmother's testimony that she would bar Mother and Father from the home. It is the function of the trial court to assess the credibility of various witnesses and to weigh the evidence. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52.) "We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of

witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence." (*Id.,* at pp. 52-53.)

Welfare and Institutions Code section 361.3, subdivision (c)(1) defines "[p]referential consideration" as "the relative seeking placement shall be the first placement to be considered and investigated." The "best interest" of the child, among other factors, remains paramount, however. (*Id.*, subd. (a)(1).) At the modification hearing, CWS presented evidence that P. is thriving in his current foster-adoptive home, his behavior has improved, and he is benefitting from the structure provided by the family. Sufficient evidence supports the court's finding that P.'s best interest - the paramount consideration - is furthered by the stability and continuity in the foster-adoptive placement.

Moreover, the juvenile court recognized the importance of P.'s best interest. The trial judge stated: "The issues, the ongoing issue, in cases of this sort, is what is in the best interests of the child? Not what the parents want. It is not what other people want. It is what is in the best interests of the child." Contrary to Great-grandparents' assertion, we do not read the court's ruling as resting upon their ages.

The orders are affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Lee Cooper, James E. Herman, Judges

Superior Court County of Santa Barbara

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